United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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76-1197

To be argued by
JOSEPHINE Y. KING

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1197

UNITED STATES OF AMERICA,
Appellant,

—*against*—

ANGEL ROSARIO,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT

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Preliminary Statement

The government appeals pursuant to Title 18, U.S.C. § 3731 from an order of the United States District Court for the Eastern District of New York (Bartels, *J.*) entered on March 10, 1976, which order granted appellee's motion to suppress evidence obtained in a search of appellee's person.

Appellee, Angel Rosario, was arrested on April 29, 1975 in Brooklyn, New York by a police officer with the New York Joint Task Force, who believed the arrestee to be one Angel a confederate of a known drug trafficker, Jose Gonzalez.[1] In fact, appellee proved not to be that Angel, but possessed the same name and answered the

[1] Gonzalez was indicted and found guilty of two counts of possession with intent to distribute and two counts of distribution of heroin. *United States* v. *Gonzalez*, 75 Cr. 378.

description of the sought confederate. A search incident to the arrest revealed six tinfoil packets containing a controlled substance. On September 24, 1975, the United States Attorney charged Rosario with knowingly, intentionally and unlawfully possessing a quantity of heroin in violation of Title 21, U.S.C. § 844(a).

Upon Rosario's plea of not guilty, the District Court set a trial date. Defense counsel moved, pursuant to Fed. R. Crim. P. 41(f) to suppress the heroin.

Judge Bartels in granting appellee's motion ruled that although it was a "close question," the arresting officer acted without probable cause in effecting the warrantless arrest. The government contends that the circumstances of the arrest, and the reliability and adequacy of the information upon which the arresting officer acted provided the necessary elements of probable cause to sustain the arrest, the subsequent search and the admissibility of the evidence obtained.

Statement of the Case

I. The Government's Case

A. Detective Balmer's Testimony

1. The meeting with Gonzalez, January 8, 1975.

Detective Horace Balmer was called as a Government witness at the hearing of January 9, 1976. He testified that he had been a detective with the New York City Police Department for eleven years and on January 8, 1975, was working as an undercover agent (A. 16-17).[2]

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[2] Page references in parenthesis refer to pages in the Government's Appendix which includes, *inter alia*, the transcript of the suppression hearing as well as some of the exhibits introduced in evidence.

On that date, he met with a fellow police officer, George LeMoine, Detective Frank Caban and an informant in Brooklyn and as a consequence of that meeting, accompanied the informant to 725 Fourth Avenue, Brooklyn, the apartment of Jose Gonzalez (A. 19). Detective Balmer was introduced to Gonzalez, discussed the future purchase of heroin from him, and received from Gonzalez a sample of heroin. Balmer related the details of the transaction to Officer LeMoine, described Gonzalez to LeMoine, and prepared his report, Government's Exhibit 1, all on the same date, January 9, 1975 (A. 19-21, 149-50).

2. The meeting with Gonzalez and Angel, January 16, 1975.

On January 16, 1975, Detective Balmer returned to the same apartment alone and found Gonzalez, a white female and another male named "Angel." Balmer then spoke with Gonzalez and Angel concerning the purchase of one ounce of heroin (A. 22). Angel in fact, promoted the heroin emphasizing that he and Gonzalez had been associated together in selling heroin for some time (A. 23).

Balmer left the apartment and returned the same evening when, for the second time, he encountered Angel. He obtained one ounce of heroin for which he paid $100 less than the full price ($2400) pursuant to an agreement that he procure a driver's license for Gonzalez (A. 25). On that same date, he described Gonzalez and Angel to officer LeMoine and repeated the description in his report, Government's Exhibit 2 (A. 26-27, 151-53). Thus, Balmer depicted Angel to LeMoine as "male, white, approximately 28 years old, five feet eight inches, 155 pounds, light complexion, blue trousers, multi-colored T-shirt and sneakers" (A. 27).

3. The meeting with Gonzalez and Angel on March 5, 1975.

On March 5, 1975, pursuant to arrangements made the day before, Detective Balmer again visited Gonzalez' apartment and found Angel present. He delivered the promised driver's license to Gonzalez. Gonzalez directed Angel to fetch the heroin. Angel then delivered the heroin to Balmer. Balmer paid $4,500 for the two ounces and agreed to procure a driver's license for Angel. Balmer was about to place the money in Angel's hand but Gonzalez took the money (A. 30-31). These events were immediately thereafter described to LeMoine and contained in Balmer's report, Government's Exhibit 3, (A. 154-55).[3]

B. Officer LeMoine's Testimony

1. Police Officer George LeMoine, the case agent, testified that he had 18 years experience in the New York City Police Department and in January, 1975, was working for the New York Drug Enforcement Administration Task Force (A. 43). LeMoine's testimony dovetailed with Balmer's testimony as to the transactions with Gonzalez and Angel as well as Balmer's description of Angel.

He further stated that no arrest warrant was procured either for Jose Gonzalez or Angel (A. 50). But LeMoine testified that he had seen Gonzalez before the date of the arrest (April 29, 1975) at least four or five times. (A. 51). He had not previously encountered Angel Rosario (A. 53).

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[3] As the case agent, all evidence developed in the investigation was "passed through" LeMoine.

On April 29, 1975, at about 6:15 in the evening LeMoine, accompanied by another officer (not Balmer) saw Gonzalez in a parked van on Fourth Avenue near 53rd Street in Brooklyn. He was specifically looking for Gonzalez (A. 54). Appellant was standing next to the driver's side of the van talking to Gonzalez. LeMoine drove past and made a U-turn to return to the van. At that point the van pulled out with Gonzalez driving and appellee seated beside him. LeMoine pulled his vehicle in front of the van, identified himself and instructed the two men to exit their vehicle. Another male and a female in the back of the van were also directed to come out (A. 54-55).[4]

LeMoine immediately placed Gonzalez under arrest. The rapid fire observations that LeMoine thereafter made included the fact that the female who exited the van closely matched, in age at least (both were young) the description of the female who was in Gonzalez' apartment on January 16 in the company of Angel. Most importantly, though, appellee's physical characteristics matched in every significant detail the characteristics of Angel, Gonzalez' associate. Thus, Angel had been described as approximately 28 years old; appellee was, in fact, 32 years of age. Angel was described as 5'8" tall; appellee was, in fact, 5'7" tall. Angel was described as weighing 155 pounds; appellee, in fact, weighed 155 pounds. Angel's complexion was described as light and he was described as being of Hispanic origin; appellee, in fact, meets both characteristics. Finally, on the two occasions that Balmer saw Angel, he was wearing casual clothing; appellee, in fact, was wearing a blue cotton shirt, a dungaree jacket and blue trousers when he was encountered by LeMoine. In his physical appearance,

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[4] It will be recalled that there was a female present during the January 16th meeting who was described as Gonzalez' girlfriend whose uncle supplied the drugs to Gonzalez (A. 65-66).

therefore, Rosario had quite nearly the same gross physical characteristics as "Angel."

When LeMoine asked Rosario for his name and was told "Angel," he placed him under arrest, believing him to be the same Angel who had played a part in the earlier drug sales by Gonzalez.

After placing Angel Rosario under arrest, LeMoine frisked him and found "six decks of tinfoil containing white powder" in "his upper left-hand dungaree jacket . . ." (A. 58). Chemical analysis revealed the white powder to be heroin (A. 59).

LeMoine testified that he "frisked"[5] Rosario at the scene and the search was conducted at the stationhouse (A. 74).[6] LeMoine noticed a "bulging pocket" and removed its contents (a Marlboro cigarette box, small wallet, possibly a handkerchief and the six "decks" of white powder) (A. 98-99). To defense counsel's question:

> At the scene where he was arrested, were you searching him to see what you could find?

LeMoine replied:

> At the scene I frisked him. I was looking for weapons at the scene. (A. 98).

The United States charged Angel Rosario with possession of heroin in violation of 21 U.S.C. § 844(a). Counsel

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[5] LeMoine defined the purpose of a frisk: "A [illegible] is to safeguard a police officer or anybody else from a we[illegible]." (A. 75). A. 75).

The Court: "All you were interested in was the bulge in the pocket the first time?"

LeMoine: "Yes." (A. 76-77).

[6] LeMoine refers to different degrees of search: at the scene, it was "not really" a search; the searches were conducted at the police station and at "our office." (A. 97).

for Rosario moved to suppress the heroin uncovered by Officer LeMoine. Following a hearing, Judge Bartels granted the motion to suppress and issued his order and opinion, dated March 10, 1976.

The District Court held that the warrantless arrest of Angel was not supported by probable cause. The description furnished the officer, who had never viewed Rosario in the flesh, lacked particularity; in the Court's opinion, the only positive factors consisted in the presence of Gonzalez at the scene and in appellee's response that his name was Angel. The Government has appealed from the order of Judge Bartels on the grounds that the totality of circumstances, the information supplied the officer and reasonable inferences to be drawn therefrom vindicate his decision to detain the appellee and remove the contents of his bulging pocket.

ARGUMENT

There was sufficient probable cause for Officer LeMoine to believe that appellee was Angel; in any event, the limited pat-down of appellee was a justified intrusion limited to protecting the safety of the officer.

The basic issue in this case is whether the officer in arresting Rosario violated his rights under the Fourth and Fourteenth Amendments with the consequence that the fruits of the limited search are inadmissible as evidence in the prosecution for possession of heroin.[7]

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[7] Since the arrest of Rosario was effected by a New York City Police Officer, we agree wiht Judge Bartels that New York law (N.Y. Crim. Proc. L. § 140.10(1)(b) [McKinney's, 1971]) is applicable, *United States* v. *DiRe*, 332 U.S. 581, 589 (1948); *United States* v. *Thomas*, 396 F.2d 310, 313 (2d Cir. 1968); *United States* v. *Thompson*, 356 F.2d 216, 223 (2d Cir. 1965),

[Footnote continued on following page]

The District Court suppressed the evidence. Despite the fact that this was a street encounter demanding almost instantaneous action by Officer LeMoine, despite the fact that appellee Rosario matched with virtual perfection the description furnished the officer, despite the fact that Rosario answered to the same name as the real suspect, despite the fact that he was in the company of the same heroin distributor—Gonzalez—whom the suspect aided in heroin transactions with DEA Agent Balmer, Judge Bartels concluded that LeMoine lacked probable cause to arrest Angel Rosario. We consider each of these facts *seriatim*, and contend that in the aggregate, they supply a solid and objective foundation for the warrantless arrest and the limited search incident to that arrest.

Preliminarily, however, we ought here state what is not in issue. There is no question that the real Angel committed a crime. He was an active participant with Gonzalez in two sales of heroin to Detective Balmer. Judge Bartels without reservation concluded that "LeMoine had probable cause to believe that a felony had been committed by someone named "Angel" . . . (A. 10) and refers to him as "Gonzalez' confederate" (A. 6, 11) who "participated in the negotiations and sale of heroin, and, on the second date, [March 5, 1975] actually delivered the heroin to Balmer . . ." (A. 5). Secondly, there is no question that LeMoine had no difficulty in identifying Gonzalez, having seen him on numerous occasions. And thirdly, there is no dispute concerning the trustworthiness of Detective Balmer, the accuracy of the information he transmitted to Officer LeMoine, or the

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cert. denied, 384 U.S. 964 (1966), but add that federal constitutional requirements must also be satisfied, *United States* v. *Tramontana*, 460 F.2d 464, 466, n. 1 (2d Cir. 1972). The New York criterion for a warrantless arrest conforms to the federal standard of probable cause, *United States ex rel. Gonzalez* v. *Follette*, 397 F.2d 232, 234 (2d Cir. 1968).

latter's qualifications as an experienced law enforcement officer.

The basic circumstance of the arrest was the observation by LeMoine that Gonzalez was in a parked van and another male standing at the driver's window was speaking to him. A few moments later, the van pulled away from the curb with the second male a passenger.

The street encounter involving a mobile vehicle, required "swift action predicated upon the one-the-spot observations of the officer . . ." *Terry* v. *Ohio*, 392 U.S. 1, 20 (1968). Given LeMoine's actual recognition of the drug trafficker, Gonzalez, and his objectively founded belief that the companion, Rosario, was the Angel repeatedly described to him, his on-the-spot observations reasonably dictated the arrest.[8]

The rapidly unfolding events demanded some responsive action on the part of the officer. Here, as in *Terry*, "It would have been poor police work indeed for an officer of . . . experience to have failed to investigate . . ." *Id.* at 23. Under the circumstances, "room must be allowed for some mistakes" on the part of enforcement officers. *Brinegar* v. *United States*, 338 U.S. 160, 176 (1949).

The second significant factor in assessing probable cause in the instant case is the accuracy of the physical description which LeMoine could draw upon in making a quick judgment as to whether the individual he ob-

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[8] This Court in an *en banc* decision discussed the special consideration applicable in street arrests in *United States* v. *Soyka*, 394 F.2d 443, 448 (2d Cir. 1968) referring specifically to *Smith* v. *United States*, 358 F.2d 833 (D.C. Cir.), *cert. denied*, 386 U.S. 1008 (1967) and *Draper* v. *United States*, 358 U.S. 307 (1959).

served on the street matched the Angel who participated in the heroin sales. Detective Balmer had depicted him as a white male, 28 years of age, five feet eight inches tall, 155 pounds and a light complexion (Government's Exhibit 2, A. 153). The person LeMoine arrested was a white male, 32 years of age, five feet seven inches tall, and 155 pounds. The variation was solely *one inch* in height and several years in age, inconsequential deviations.

The District Court refused to accord any significance to the accuracy or relevancy of this physical description on the ground that it "would fit a very large group of ordinary young men" (A. 10), and further discredited its usefulness by observing that at the time of arrest Angel was not wearing the same clothes Balmer described in his report of the January 16, 1975 heroin transaction (A. 153). As to this latter point, we see no significance, since it is to be expected that an individual's apparel will vary from one occasion to the next; however, at all times in question, the clothing was consistently casual.

Neither did the District Court recognize that knowledge by LeMoine of the suspect's first name, Angel, added to the particularity of the description, nor did it concede that Rosario's response that *his* name was Angel contributed to probable cause for the arrest. We interpret the District Court opinion as seeking to impress upon the Fourth Amendment an imperative that an arrest with or without a warrant is invalid unless the arresting officer acts pursuant to a meticulously detailed and accurate description of the suspect. We disagree. Such a gloss is not dictated by the language of the constitution, by decisional law or by actual practice. An arrest warrant on its face contains no physical description of the individual to be apprehended. A marshal executing a warrant would not necessarily possess more—and might act on less—information than officer LeMoine in the in-

tant case. Furthermore, courts have upheld warrantless arrests on less detailed physical descriptions than LeMoine possessed in this case: *United States* v. *Riggs*, 474 F.2d 699 (2d Cir.), *cert. denied*, 414 U.S. 820 (1973), where the defendant was described as a young, negro female last seen wearing an orange coat and carrying a paper bag and possibly answering to a confusing variety of aliases; *Chambers* v. *Maroney*, 399 U.S. 42 (1970), where the suspect was described as a man wearing a green sweater in a blue station wagon; *People* v. *Santiago*, 13 N.Y. 2d 326 (1964) where the police had obtained a telephone number and address from a drug addict. While a faultless and infinitely particularized description would result in fewer arrests of misidentified subjects, the law does not require such perfection.

We must also respectfully disagree with the District Court's view that no significance may be attributed to the joint presence of Gonzalez and the appellee and their obvious familiarity as a factor in establishing probable cause. In *United States* v. *Salas*, 488 F.2d 939 (5th Cir. 1974), a warrantless arrest was sustained where the arrestee, unknown to the federal officers, was apprehended after leaving a house in which drug trafficking was suspected. In *Clay* v. *United States*, 394 F.2d 281 (8th Cir. 1968), the arrest was sustained in part because the suspect was in the presence of another individual believed to be armed. And in *Hill* v. *California*, 401 U.S. 797 (1971) the arrest of the wrong individual was justified by his presence in the apartment the actual suspect shared with an informant.* To reject the relation-

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* In applying *Hill*, the Seventh Circuit has held that an arrest or stop involving a reasonable mistake of identification is not unlawful. *United States ex rel. Kirby* v. *Sturges*, 510 F.2d 397, 401 (7th Cir.), *cert. denied*, —U.S.— (1975). The Eighth Circuit in a case antedating *Hill*, *Clay* v. *United States*, 394 F.2d 281, 286 (8th Cir. 1968), found that probable cause supported the arrest of the wrong individual.

ship of the arrested Rosario with Gonzalez in the instant case as purely "guilt by association," is not in accord with these decisions which predicate probable cause to a significant degree on the presence of the arrestee in the actual or constructive company of a known criminal confederate.

Given this confluence of events—a man met on the street who has the same physical characteristics, name and associate as the true suspect, what inferences was officer LeMoine entitled to draw? It was highly probable that: the individual accompanying Gonzalez was the actual confederate, Angel; that he was not engaging in idle chatter with Gonzalez as a casual, social acquaintance, particularly after the two drove off when the officer's car passed them; that those who deal in narcotics are often armed and dangerous, *United States* v. *Weiner*, slip op. 266at 2757 (2d Cir. 1976); and that a bulging pocket may conceal a weapon, *United States* v. *Lindsey*, 451 F.2d 701, 703 (3d Cir. 1971)

Under the circumstances, what was officer LeMoine to do? Arrest Gonzalez alone because he was the only individual in the car whom LeMoine had personally seen five or six times? In answering these questions, we find the language of Judge Friendly in *United States* v. *Soyka*, 394 F.2d 443, 451 (2d Cir. 1968) most appropriate: "Most citizens would have regarded Agent Waters as guilty of a gross dereliction of duty if he had meekly allowed Soyka to retreat. . . . Agent Waters did not have time to consult a set of the United States reports. . . . Rather he was obliged to make the best decision he could on the spot." Exactly the same may be said of officer LeMoine.

Finally, we must offer a remonstrance to the District Court's overall requirement that "LeMoine was obligated before the arrest to make *certain* that the person to be

arrested as 'Angel' was the person described to him by Balmer" (A. 10, emphasis supplied). This is not the accepted judicial definition of probable cause. Probable cause is more than suspicion but patently less than proof beyond a reasonable doubt, *Clay*, *supra* at 285; it involves "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar*, *supra* at 175. Accordingly, there must be "fair leeway for enforcing the law...." *Id.* at 176.

An appraisal of the reasonableness of a warrantless arrest requires no abdication of common sense, *United States* v. *Ventresca*, 380 U.S. 102, 109 (1965); *United States ex rel. Gonzalez* v. *Follette*, *supra* at 235. On the contrary, it is to be assessed against the totality of the circumstances, and the specific facts available to the enforcement officer at the moment he effects detention, *Carroll* v. *United States*, 267 U.S. 132, 162 (.....); *Clay*, *supra* at 286; *United States ex rel. LaBelle* v. *LaVallee*, 517 F.2d 750 (2d Cir. 1975); and the Governmental interest justifying the intrusion, *Camara* v. *Municipal Court*, 387 U.S. 523, 534-37 (1967). "Each case of this sort will, of course, have to be decided on its own facts." *Terry*, *supra* at 30.

To require absolute certainty on the part of the arresting officer renders the entire concept of probable cause superfluous. "Sufficient probability, not certainty" is the standard of reasonableness under the Fourth Amendment, *Hill*, *supra* at 804. Under that standard the protective frisk conducted by LeMoine and the seizure of the heroin from Rosario's bulging pocket were fully justified.

There is no ambiguity in LeMoine's testimony that he did not conduct a *full* search at the time he detained Rosario; that occurred at the stationhouse (A. 74, 76).

To conduct a limited search, it is not necessary that the officer be "absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Terry, supra* at 27; *Beck* v. *Ohio*, 379 U.S. 89, 91 (1964); *Brinegar, supra* at 174-76. We assert that in this case, where the officer frisked Rosario, observed the distended pocket and removed its contents, the intrusion was confined to the minimal necessities of the situation and reached no further than the outer surfaces of Rosario's clothing.

CONCLUSION

The Order of the District Court should be reversed.

Dated: June 18, 1976

Respectfully submitted,

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* The United States Attorney's Office wishes to acknowledge the assistance of Mary H. Smith in the preparation of this brief. Mrs. Smith is a third year law student at Hofstra Law School.

★ U. S. Government Printing Office 1976—614—353—219

AFFIDAVIT OF MAILING

STATE OF NEW YORK
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EVELYN COHEN, being duly sworn, says that on the 21st day of JUNE, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF FOR THE APPELLANT of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Richard Rosenkranz, Esq.
66 Court Street
Brooklyn, N.Y. 11201

Evelyn Cohen

Sworn to before me this
21st day of June, 1976

Carolyn M. Johnson

CAROLYN M. JOHNSON
NOTARY PUBLIC, State of New York
No. 41-4618298
Qualified in Queens County
Term Expires March 30, 19...